

NOV 16 2001

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

In the Matter of)
)
 Amendment of Section 73.202)
 Table of Allotments,)
 FM Broadcast Stations.)
 (Oswego and Granby, New York))

MM Docket No. 00-169
 RM-9953

To: Chief, Mass Media Bureau

MOTION TO STRIKE LATE-FILED OPPOSITION TO MOTION FOR STAY

Clear Channel Broadcasting Licenses, Inc. ("CCBL"), the licensee of WXBB(FM) (formerly WVOA(FM)), Facility ID No. 22134, DeRuyter, New York, by its attorneys, hereby moves to strike the late-filed Opposition to Motion for Stay (the "Opposition") of Galaxy Communications, L.P. ("Galaxy"), dated November 6, 2001, to CCBL's Motion for Stay, dated October 22, 2001 (the "Motion"). The Motion requests a stay of the Allocations Branch's recent decision in the above-referenced proceeding (the "*Order*") pending disposition of CCBL's Petition for Reconsideration ("Reconsideration Petition"). 1/

Under Section 1.45(d) of the Commission's Rules, "oppositions to a request for stay of any order or to a request for other temporary relief shall be filed within 7 days after the request is filed." 47 C.F.R. § 1.45(d). Furthermore, under the Commission's Rules, a filing period includes all calendar days, notwithstanding intermediate holidays, unless "the filing period is *less than* 7 days." See 47 C.F.R. § 1.4(g). Section 1.45(d) goes on to state that "[t]he provisions of Section 1.4(h) [which grants parties an additional 3 days to respond to pleadings

1/ See *Oswego and Granby, New York*, Report & Order, MM Docket No. 00-169 (Allocations, released September 21, 2001).

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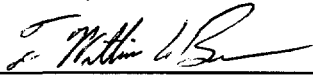
served by mail] shall not apply in computing the filing date for oppositions to a request for stay or other temporary relief." *See* 47 C.F.R. §§ 1.4(h) & 1.45(d).

CCBL filed the Motion on Monday, October 22, 2001. Under Section 1.45(d), Galaxy was required to file any opposition within seven calendar days, or Monday, October 29, 2001. Galaxy did not submit its opposition for eight additional days -- until November 6, 2001. This delay is prejudicial to CCBL, which requires grant of a stay as quickly as possible to ensure that it does not have its pending application to modify WXBB dismissed or forcibly modified.

Accordingly, the Commission should strike Galaxy's late-filed opposition, which was submitted without any request for, or justification of, a waiver of the applicable rule, and grant CCBL's Motion for Stay. 2/

Respectfully submitted,

**CLEAR CHANNEL BROADCASTING
LICENSES, INC.**

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November 16, 2001

2/ To the extent the Commission nonetheless considers waiving the application of Section 1.45(d), CCBL accordingly requests that the Commission likewise waive the rule's limitation regarding the filing of any reply to the Opposition. *See* 47 C.F.R. § 1.45(d). Such a waiver of the Rule for both parties, while not equitable to CCBL, at least would ensure that the Commission would have a complete record to resolve this important Motion. In order to facilitate this matter, CCBL has attached such reply to this Motion to Strike.

CERTIFICATE OF SERVICE

I, Charlene Jones, hereby certify that on this 16th day of November, 2001, a copy of the foregoing Motion to Strike Late-Filed Pleading was sent by first-class mail, postage prepaid, to:

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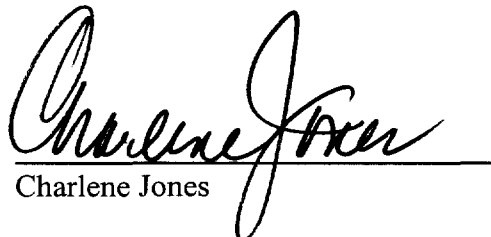
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To: Chief, Mass Media Bureau

REPLY TO OPPOSITION TO MOTION FOR STAY

Clear Channel Broadcasting Licenses, Inc. ("CCBL"), the licensee of WXBB(FM) (formerly WVOA(FM)), Facility ID No. 22134, DeRuyter, New York, by its attorneys, hereby replies to the Opposition to Motion for Stay, dated November 6, 2001 (the "Opposition"), of Galaxy Communications, L.P. ("Galaxy") to CCBL's Motion for Stay, dated October 22, 2001 (the "Motion"). The Motion requests a stay of the Allocations Branch's recent decision in the above-referenced proceeding (the "*Order*") pending disposition of CCBL's Petition for Reconsideration ("Reconsideration Petition"). ^{1/} Notwithstanding Galaxy's assertions, CCBL has demonstrated that a stay is consistent with the public interest and should be granted.

Galaxy alleges that a stay is not necessary because 1) the Commission no longer grants "automatic" stays against reallocation proposals that are subject to a petition for reconsideration; 2) Galaxy asserts that the Reconsideration Petition will not succeed notwithstanding the failure of the *Order* even to mention, never mind distinguish, established policy and extensive precedent directly contrary to the outcome of the *Order*; and 3) a stay might

^{1/} See *Oswego and Granby, New York*, Report & Order, MM Docket No. 00-169 (Allocations, released September 21, 2001).

delay Galaxy's efforts to construct a new facility but might not cause other harms. None of these arguments can be a basis for denying the requested stay, which not only protects the integrity of the Commission's processes, policy and precedent while reconsideration is pending, but also preserves and protects the Commission's resources, other potential applicants, the timely filed WXBB Modification Application and the public interest.

First, although the Commission eliminated the rule *requiring* automatic stays of rulemaking decisions upon the filing of a petition for reconsideration, it expressly noted that it would remain "particularly cognizant" of stay requests filed by stations that would be subject to involuntary changes as a result of a rulemaking. ^{2/} That is precisely the harm posed to CCBL's application here. Second, the Opposition fails to counter the wealth of precedent detailed in CCBL's pleadings which demonstrate that the *Order* not only applied the wrong standard, but reached the wrong result. That Galaxy continues to be unable to set forth even one comparable allotment case where the Commission has taken action similar to that taken here demonstrates the emptiness of Galaxy's assertion that the Reconsideration Petition is unlikely to succeed. Third, Galaxy misstates the nature and the balance of the harms and public interest benefits that would result from grant of a stay. Put simply, the irreparable injury that the *Order*, if not stayed, will cause CCBL is but one of the many public detriments likely to result from premature enforcement of the *Order*. Accordingly, the Commission should protect both the public interest and its own policies, precedent and processes and grant the requested stay.

^{2/} *Amendment of Section 1.420(f) of the Commission's Rules Concerning Automatic Stays of Certain Allotment Orders*, Report & Order, 11 FCC Rcd 9501, 9505-06 (1996) ("*Automatic Stay Order*").

**The Commission Remains "Particularly Cognizant" of Stays Necessary
to Protect Parties Subject to Involuntary Changes**

Galaxy is right that the Commission's Rules no longer require the Bureau to stay the *Order* automatically upon CCBL's filing of the Reconsideration Petition. ^{3/} But Galaxy is clearly wrong when it suggests that the Commission's decision to eliminate this "automatic stay" requirement does not support a stay in this instance. To the contrary, in deciding to eliminate that automatic stay rule, the Commission expressly noted that it remains ready to grant stays, pending reconsideration, of planned reallocations in cases, such as this one, where the party requesting the stay actually would be forced to change some aspect of its own planned operations in order to accommodate the reallocation proposal. The obvious reasoning of the *Automatic Stay Order* was that such cases, in which a party was directly and adversely affected by the grant of an allocation proposal, were particularly deserving of a stay. Here, the *Order* goes so far as to force either the modification or dismissal of the timely filed WXBB Application. Accordingly, both the express language and the overall sense of the *Automatic Stay Order* directs the Commission to be "particularly cognizant" of CCBL's request for stay.

**The Weakness of the Opposition's Arguments Only Confirm That
the Petition Will Succeed on Its Merits**

The Reconsideration Petition demonstrates, based on established Commission policy and extensive fact-specific precedent, that both the method and the outcome of the *Order* require reconsideration. First, the *Order* must be reconsidered because it failed even to mention the Commission policy most relevant to a conflict between a rulemaking proposal and a timely

^{3/} Opposition at 2. See *Automatic Stay Order*, 11 FCC Rcd at 9505-06 ("[W]e retain the authority . . . to impose a stay in individual cases and we will be particularly cognizant of requests for stay filed by any party whose authorization would be changed involuntarily.")

filed application: that the Commission will “resolve conflicts between a rulemaking petition and a later-filed FM application *by imposing a site restriction on the proposal in the petition, or by allotting an alternate channel for that proposed in the petition*, whenever it is possible to do so.” 4/ Even Galaxy does not attempt to contend that this is not the relevant standard. Nor does Galaxy demonstrate that CCBL's plan to change the theoretical reference coordinates for the Granby allotment would have caused any actual prejudice. 5/ Instead, Galaxy argues that, even though the Commission said it would accommodate both an application and a rulemaking proposal “whenever possible,” it actually meant “whenever the Allocations Branch chooses to do so.” 6/ Such a blatant rewriting of the controlling statement of Commission policy in this matter must be rejected in favor of the Commission’s established practice in favor of resolving such

4/ See *Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments*, Report & Order, 7 FCC Rcd 4917 (1992), *on reconsideration*, 8 FCC Rcd 4743, 4745 n. 12 (“*Conflicts Recon Order*”) (emphasis added). The emphasized language was omitted by Galaxy, but underscores that the *Order* should have employed a site restriction on or alternate reference coordinates for the Granby rulemaking proposal rather than modify the actual transmitter site proposed in the WXBB Modification Application.

5/ See Reconsideration Petition at 8-9 (explaining that Galaxy neither had demonstrated nor could demonstrate at any point in the rulemaking proceeding that it would suffer actual prejudice to its legitimate rights as a rulemaking proponent if the Commission had employed an alternate set of theoretical reference coordinates that would have accommodated both Galaxy’s proposal and the WXBB Application). In contrast, both the *Conflicts Recon Order* and actual Commission practice, as well as CCBL's pleadings in this matter, demonstrate that a change in an application's proposed transmitter site does cause prejudice. *Cf. Conflicts Recon Order*, 8 FCC Rcd at 4745 n.12 (noting that allotment proposal must protect “the transmitter site” specified in a conflicting application” and suggesting only changes to the conflicting rulemaking proposal to resolve any conflict with a later filed timely application).

6/ See Opposition at 4 (claiming Allocations Branch retains untrammelled discretion to determine what constitutes prejudice to rulemaking proposal, despite substantial case law in which it was concluded that site restrictions or alternate reference coordinates are not prejudicial).

conflicts through site restrictions on or alternate reference coordinates for the rulemaking proposal.

Moreover, even without this clear policy statement, a wealth of Commission case law dictates that the *Order* should have modified the theoretical set of reference coordinates for the Granby allotment rather than force a change in the bona fide transmitter site proposed in the WXBB Application. Galaxy does not even attempt to counter the host of precedent – including *Warrenton, Georgia*, *Kerman, California*, *Weaverville, California*, and *Roxton, Texas* – in which the Commission has employed a site restriction or attempted to locate an alternate set of reference coordinates for a rulemaking proposal so that a timely filed application could be processed without change. ^{7/} At most, Galaxy attempts to distort the meaning of one sentence in *Kerman, California* to support its assertion that the Commission has no established policy of

^{7/} See *Roxton, Texas and Soper, Oklahoma*, Report & Order, 13 FCC Rcd 20992 (Allocations, 1998) (granting counterproposal with site restriction to permit conflicting one-step application); *Weaverville, California*, Report & Order, 12 FCC Rcd 2965, 2967 (¶ 3) (Allocations, 1997) (attempting to use alternate reference coordinates for rulemaking proposal to avoid conflict with timely application); *Kerman, California*, Report & Order, 11 FCC Rcd 2887, 2887-88 (Allocations, 1996) (using alternate reference coordinates an alternate channel for rulemaking proposal to avoid conflict with timely application); *Warrenton, Georgia*, Report & Order, 6 FCC Rcd, 5174, 5174 (¶¶ 2-3) (Allocations, 1991) (using alternate reference coordinates for rulemaking proposal to avoid conflict with timely application). Galaxy still has not cited even one applicable case where the Commission actually has modified the real coordinates of a timely application in order to protect a proposed set of theoretical reference coordinates of a rulemaking proposal. (For example, Galaxy's cite to the hypothetical examples provided with regard to conflicts with one-step upgrade changes – which is not the type of change that CCBL has proposed – is meaningless in the face of actual and contrary Commission precedent. See *Mass Media Bureau Offers Examples of the Treatment of Applications Filed Under the New "One Step" Process*, Public Notice 73 RR 2d 1474, 1475 (MMB, 1993). More to the point, none of these hypothetical examples cited in the Notice actually appear to be the circumstances involved in this case.) The *Order* likewise cited no such supporting fact-specific precedent. The lack of such precedent – especially in the face of the host of contrary precedent detailed by CCBL – itself compels reconsideration of the *Order*.

focusing on alternate reference coordinates as the preferred means to resolve such conflicts. 8/ But even this lone sentence, when taken in context, demonstrates that Commission policy obviously favors the use of alternate reference coordinates in order to preserve an actual transmitter site proposed in a timely filed application.

In *Kerman*, the issue was whether, in order to resolve a conflict between a rulemaking proposal and a timely modification application, the Commission could prescribe only an alternate channel *or* alternate reference coordinates for a rulemaking proposal or whether it could prescribe both. 9/ Sensibly, the Commission expressly rejected a “narrow[]” application of its mutual accommodation policy that would have limited how the Commission could modify the rulemaking proposal in order to accommodate a conflicting application. The specific sentence that Galaxy cites was the Commission’s reasonable explanation why it could prescribe both an alternate channel *and* an alternate set of reference coordinates for the rulemaking proposal, despite language in the *Conflicts Recon Order* suggesting that the Commission could only do one or the other. Regardless, since the instant conflict may be resolved simply by the designation of alternate reference coordinates for the rulemaking proposal, either interpretation of the *Conflicts Recon Order* should have compelled the Allocations Branch to adopt CCBL’s proposed outcome. More to the point, the results of *Kerman* – as well as similar decisions before and after the policy statement announced in the *Conflicts Recon Order* – only confirm that the Reconsideration Petition should be granted.

8/ See Opposition at 4.

9/ See *Kerman, California*, Report & Order, 11 FCC Rcd at 2887-88.

That this array of precedent demonstrates that CCBL's preferred outcome is in fact entirely consistent with Commission policy and practice is not, in Galaxy's phrase, "misleading." What is misleading is Galaxy's continued effort to suggest that the Commission can ignore its established policy and refuse to make the slight changes necessary to Galaxy's proposed reference coordinates for the Granby allotment in order to allow the WXBB Application to proceed unamended. ^{10/} Established Commission precedent, policy and practices direct prompt reconsideration of the *Order*. Accordingly, it is highly likely that the Petition will succeed on its merits.

Injury to CCBL and to the Public Interest Underscores the Need for Stay

With regard to the harms and benefits of the requested stay, the Opposition is again wrong as to the relevant standard and the critical facts. First, the Opposition fails to note that, when a petition for reconsideration is very likely to succeed on the merits, even a minimal showing of irreparable injury justifies a stay. ^{11/} Second, the Opposition is wrong when it asserts the injury to CCBL is not irreparable. To the contrary, the injury that the *Order* will

^{10/} Also, Galaxy's continued reference to the actual transmitter site specified in the WXBB Application as mere "reference coordinates" is neither accurate nor consistent with the established differences between rulemakings and applications. *See* Opposition at 4. Nor should Galaxy's recent attempt to make its proposal "equivalent" to an application – by specifying a set of "real" coordinates -- be any reason not to reconsider the *Order's* result. The *Order* was the wrong decision at the time it was issued. Post-decision efforts to try to transform a rulemaking proposal into an application cannot justify the *Order's* incorrect preference for a set of theoretical reference coordinates over the coordinates of a bona fide transmitter site that has been proposed in a timely filed application.

^{11/} *See, e.g., CityFed Financial Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir., 1995) (noting that equitable relief "may be justified, for example, where there is a particularly strong likelihood of success on the merits even if there is a relatively slight showing of irreparable injury" and citing *Population Inst. v. McPherson*, 797 F.2d 1062, 1078 (D.C.Cir.1986)).

cause CCBL is clearly imminent, certain and significant. Under the *Order*, the WXBB Application faces forcible modification or dismissal. In either case, the Application no longer would be automatically protected with regard to later-filed applications.

Galaxy's subsequent argument – that the loss of such protection does not constitute irreparable injury unless and until another party files a conflicting application – simply misunderstands the full nature of the injury that such loss of protection will cause CCBL. The injury to CCBL does not start when an application that would conflict with the current WXBB Modification Application is filed. Rather, the injury begins the moment that CCBL cannot be assured that all potential applicants have real notice that the WXBB Application, as initially filed by CCBL, is likely to be granted following reconsideration. Procedurally, even this temporary loss of protection that would otherwise be afforded the WXBB Application must be deemed an irreparable injury. In addition, in order to minimize any risk that CCBL will be delayed from being able to construct a new facility pursuant to the current WXBB Application by a later-filed application, CCBL would have to monitor all future applications to assure that one that conflicts with the Application is not mistakenly granted and/or licensed. Such an ongoing drain on CCBL's resources is likewise irreparable under Commission procedures. Such irreparable injuries, which are of the sort that formerly justified an automatic stay in any instance involving the reconsideration of an allotment proceeding, certainly suffice to justify a stay in this instance.

Moreover, this loss of notice is not merely an injury to CCBL, but to the Commission and other potential applicants. The Commission would waste resources processing

applications that must be rescinded if the Reconsideration Petition is granted. ^{12/} Likewise, even potential applicants may waste resources considering proposals that they would not have considered if the WXBB Modification Application retained its customary level of cut-off protection pending reconsideration.

And the Commission, CCBL and other applicants suffer one final and immediate injury from the outcome of the *Order*. If CCBL modifies the WXBB Application as directed by the *Order*, the Commission effectively has caused CCBL file a contingent and multiplicitous application – a modified version of the current WXBB Application that will be discarded if CCBL prevails on reconsideration. Requiring such premature modification of the WXBB Application while reconsideration is pending is nonetheless likely to result in the several public interest harms that the Commission has historically attempted to avoid by declining such applications. ^{13/} For example, the Audio Services Division may waste time reviewing and granting an "alternate" WXBB application only to be forced to review the initial WXBB Application following reconsideration. Such an injury provides still further justification for grant of the requested stay.

In short, the harms caused by a failure to stay the *Order* far outweigh any injury that is likely to be caused to Galaxy by grant of the stay. Galaxy's own actions demonstrate that its claim that the stay actually would delay its construction efforts is mere speculation. For

^{12/} In addition, the Commission will have to endure the considerable administrative burden of conditioning the grant of any potentially conflicting application upon the outcome of this proceeding.

^{13/} Cf. *Comark Television, Inc.*, Memorandum Opinion & Order, 51 RR 2d 738 (¶ 9) (1982) (noting that applications that cannot all be granted "may waste the Commission's resources, unfairly prejudice other applicants, and delay service to the public").


example, Galaxy admits that it is unwilling to finalize an agreement to use its proposed site pending the stay in the Opposition. 14/ But, if Galaxy is confident of its ability to prevail on reconsideration, then Galaxy really has no reason not to secure such a site immediately, regardless of the outcome of the Motion for Stay. Accordingly, as Galaxy appears reluctant to complete construction until reconsideration of this matter is complete in any event, the stay would cause it no material harm. Regardless, at most, the stay will delay final implementation of both Galaxy's and CCBL's proposals, which, given the substantial other harms that may result from denial of the stay, is no basis to reject the stay in this instance.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Bureau stay the effect and requirements of the *Order* pending disposition of the Reconsideration Petition.

Respectfully submitted,

**CLEAR CHANNEL BROADCASTING
LICENSES, INC.**

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14/ Opposition at 7 (admitting that Galaxy has not finalized arrangement for its proposed site " particularly in light of the pending *Motion for Stay*").

CERTIFICATE OF SERVICE

I, Charlene Jones, hereby certify that on this 16th day of November, 2001, a copy of the foregoing Reply to Opposition to Motion for Stay was sent by first-class mail, postage prepaid, to:

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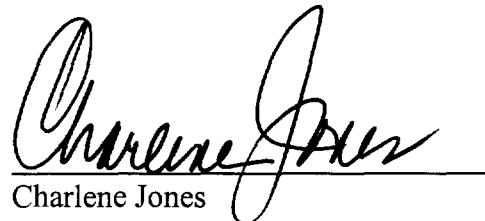
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